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IN THE

Supreme Court of the United States

October Term 1979

No. 79-1177

LLOYD MCBRIDE, President and FRANK MCKEE, Treasurer, for and on behalf of the United Steelworkers of America, AFL-CIO-CLC and its entire membership, and LYNN WILLIAMS, JOSEPH ODORICH, LEON LYNCH, ERNEST JANAK, ROBERT CLOWERS, DICK EAGLEHOUSE, ROBERT KELLEY, and FRANK ANGLIN,

Petitioners,

v.

ROCKEFELLER FAMILY FUND, NEW WORLD FOUNDATION, FIELD FOUNDATION, SAMUEL RUBIN FOUNDATION, J. M. KAPLAN FUND, INC., OTTINGER FOUNDATION, COMMUNITY FUNDS, INC., YOUTH PROJECT, and ASSOCIATION FOR UNION DEMOCRACY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents Rockefeller Family Fund and Community Funds, Inc. oppose the petition of Lloyd McBride, et al., for a writ of certiorari. Petitioners have demonstrated no special or important reason for review. Their dissatisfaction with the decision below is insufficient.

QUESTIONS PRESENTED

1. Does the decision of the Court of Appeals affirming the District Court's refusal to imply a private right of action to enforce Section 401(g) of the Labor—Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 481(g), conflict in any way with applicable decisions of this Court?

2. Is the decision below in conflict with the decision of a Court of Appeals for another Circuit?

STATUTORY PROVISIONS INVOLVED

Section 401, which was not set forth in its entirety in the Appendix to the petition, is reprinted in full in the Appendix to this brief.

STATEMENT OF THE CASE

The Complaint

Plaintiffs-petitioners, officers and members of the United Steelworkers of America (the "union"), commenced this action purportedly on behalf of the union and its membership, seeking injunctive relief and damages for alleged violations of § 401(g) of Title IV of the LMRDA and unspecified provisions of the law of the State of New York (Complaint ¶ 1, A.* 8a-9a).

Count I of the complaint alleged in substance that defendants-respondents Rockefeller Family Fund, The New World Foundation, Inc., J.M. Kaplan Fund, Inc., Field Foundation, Samuel Rubin Foundation, Ottinger Foundation, Community Funds, Inc. and Youth Project (hereinafter sometimes collectively referred to as "defendant-donors") violated § 401(g) of the LMRDA by making grants to defendant-respondent Association for Union Democracy ("AUD") as a conduit to funnel the grants to a slate of insurgent candidates headed by Edward Sadlowski in the February 1977 campaign for election of union officers (Complaint ¶ 24, A. 13a); that

* References to "A." are to pages of the Appendix to the petition.

the opposing slate headed by plaintiff Lloyd McBride was elected* (Complaint ¶ 22, A. 13a); that defendants, although not alleged to employ members of the union, are "employers" within the meaning of § 401(g) (Complaint ¶ 23, A. 13a); and that defendants' acts "deprived plaintiffs of their right under the LMRDA to have USWA officers elected free from interference by employers" (Complaint ¶ 27, A. 16a).

Count I failed to allege fulfillment of certain conditions required by § 402 for enforcement of § 401(g), namely: (1) that plaintiffs have exhausted internal union procedures; (2) that they have complained to the Secretary of Labor; and (3) that the Secretary has found probable cause to believe that the 1977 union election was invalidated by defendants' wrongdoing. See 29 U.S.C. § 482 (A. 21a-22a). The absence of taint in the election is obvious from plaintiff McBride's victory (Complaint ¶ 32, A. 13a).

Counts II and III alleged in substance that defendants' conduct in connection with the February 1977 election "constitutes an intentional tort under the laws of the State of New York" (Complaint ¶ 32, A. 17a) and an inducement of breach of the contract contained in the union's Elections Manual (Complaint ¶¶ 35-40, A. 18a); that plaintiffs were deprived of their "right to freely and democratically select their leaders without employer interference" (Complaint ¶ 35, A. 18a); and that plaintiffs were damaged by the threat posed thereby to the legality of the 1977 union election (Complaint ¶ 32, A. 17a).

The relief sought was a declaratory judgment that defendants' alleged conduct during the 1977 election violated § 401(g) of the LMRDA and the laws of New York, an injunction against future violations, and damages** (Complaint, A. 19a).

* The petition (p. 4) concedes that "The monies spent by defendants did not affect the outcome of the 1977 USWA election; all members of the benefited slate lost."

** Plaintiffs have now abandoned their damages claim. (See, Petition, p. 3, footnote 2.)

Proceedings and Decisions Below

Defendants moved the District Court for an order dismissing the complaint on the grounds that assuming, *arguendo,* the truth of plaintiffs' allegations, the Court was without federal jurisdiction to determine whether or not the actions complained of violated § 401(g) of the LMRDA inasmuch as Congress had explicitly conferred the sole power to make this determination on the Secretary of Labor, and was without pendent jurisdiction to determine the validity of the purported state law causes of action inasmuch as Congress had legislated an exclusive, preemptive federal remedy for adjudicating all election complaints stemming from the subject matter of § 401. The District Court (Canella, J.) granted the motion and dismissed all three counts of the complaint (A. 5a-7a).

The Court of Appeals affirmed (A. 1a-4a). The Court found that the procedure for enforcement by the Secretary set forth in § 402 of the LMRDA constituted the exclusive enforcement procedure for all violations of § 401(g), regardless of whether the alleged violator was affiliated with a union or an employer; that such procedure is "adequate to deal with employer contributions to union candidates as well as union contributions to union candidates"; and that the remedy Congress provided redressed the violation "irrespective of the identity of the § 401 violators" (A. 4a). The Court held that the implication of a private right of action by plaintiffs would disrupt "the centralization of litigation and the limitation on judicial interference in union affairs" which Congress intended by vesting all enforcement authority in the Secretary of Labor and by authorizing the Secretary to act only where necessary to prevent "violations of § 401 from resulting in the tainted election of union officials" (A. 4a).

The Court of Appeals further held that defendants' alleged conduct did not give rise to any cause of action under the law of New York since the allegations were "inextricably bound up in the statutory provisions of Title IV of the LMRDA" and that the exclusive enforcement mechanism provided therein "preclude[d] state courts from addressing these issues" (A. 4a).

ARGUMENT

I

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW OF THE DECISION BELOW, WHICH IS ENTIRELY CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT ON IMPLIED RIGHTS OF ACTION

While the petition occasionally attempts to suggest that the decision of the Court of Appeals ignores principles announced by this Court (p. 10), its gravamen is that the decision "is wrongly reasoned and wrongly decided" (p. 14). It is, of course, fundamental that mere error is not a ground for certiorari. See, *Magnum Import Co. v. Coty,* 262 U.S. 159, 163 (1923).

The decision below is in full accord with recent decisions of this Court setting forth the prerequisites for implying a private right of action under a federal statute which does not explicitly grant such a right. The teaching of those cases is that the question turns on the intent of Congress. See, *Cort v. Ash,* 422 U.S. 66 (1975); *Cannon v. University of Chicago,* 441 U.S. 677 (1979); *Touche Ross & Co. v. Redington,* U.S. , CCH Fed.Sec.L.Rep. ¶ 96,894 (June 18, 1979); and *Transamerica Mortgage Advisors, Inc. v. Lewis,* U.S. , 48 L.W. 4001 (November 13, 1979). The decision below faithfully followed that teaching and the petition fails to demonstrate the contrary. Accordingly, there is no reason for review by this Court.

Congress amply manifested its intent to deny any private cause of action under Title IV. Congress debated at length and rejected two different bills (S.748 and H.R.8342, 86th Congress, 1st Sess.)—each of which would have permitted private rights of action by union members under Title IV regardless of the identity of the transgressors—and chose, instead, to confer exclusive enforcement powers on the Secretary of Labor. See, S.Rep. No. 187, 86th Congress, 1st Sess., p. 21 (1950); 2 U.S. Code Congressional and Administrative News, p. 2337. See also, *Wirtz v. Local 153, Glass Bottle Blowers Association of*

U.S. and Canada, 389 U.S. 463, 473 (1968) ("Congress deliberately gave exclusive enforcement authority to the Secretary . . . In so doing, Congress rejected other proposals, among them plans that would have authorized suits by complaining members in their own right."); *Calhoon v. Harvey,* 379 U.S. 134, 140 (1964); *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 533-536 (1972); *Dunlop v. Bachowski,* 421 U.S. 560, 566-7 (1975).

This indication of Congressional intent to deny any right of private enforcement is, as this Court held in *Cort v. Ash, supra,* "controlling". 422 U.S. at 82. See also, *Touche Ross & Co. v. Redington, supra,* CCH Fed.Sec.L.Rep. ¶ 96,894 at 95,670 ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.").

Additional and compelling evidence of Congress's deliberate intent to deny any private right of action for any violation of Title IV of the LMRDA is found in the very structure of the Act as adopted: both in the provision of an exclusive remedy for such violations (29 U.S.C. §§482, 483) and in the provision for private enforcement of another part— Title I—of the same statute (29 U.S.C. § 412). See, *Amalgamated Clothing Workers v. Amalgamated Clothing Workers,* 473 F.2d 1303, 1305 (3rd Cir. 1973).

As noted above, Congress explicitly conferred on the Secretary of Labor exclusive jurisdiction to bring suit to enforce § 401—including § 401(g), regardless of the identity of the violators—and only upon the finding that a violation may have tainted the outcome of the election. There is nothing "bizarre" (Petition, p. 12) about this remedy where employer rather than union monies are contributed to or applied in an election campaign. If the Secretary finds that such monies tainted the election outcome, his object is the same regardless of the identity of the contributor: invalidation of the election and ouster of the improperly elected union officials. Any "burden" (Petition, pp. 9-10) on union rank and file of voiding the tainted election and of holding a new one is inherent in the

Congressional remedy and is no different when employers rather than union members or officers are the alleged violators.

In view of the express and exclusive remedy provided by Congress, as this Court noted in *Transamerica Mortgage Advisers Inc. v. Lewis, supra,* 48 L.W. at 4003, "... it is highly improbable that Congress absentmindedly forgot to mention an intended private right of action (citations omitted)." In keeping with the mandate of Congress, this Court has held that the method of redress provided by § 402 is the sole remedy for violation of the election procedures set forth in § 401 and has repeatedly refused to permit any action by any party which is in any way inconsistent with that method of redress. See, *Calhoon v. Harvey, supra,* 379 U.S. at 140; *Wirtz v. Local 153, Glass Bottle Blowers Association of U.S. and Canada, supra,* 421 U.S. at 566-7; *Hodgson v. United Steelworkers of America,* 403 U.S. 333, 338-9 (1971).

Congress's reasons for providing the exclusive remedy were summarized by this Court in *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 532 (1972):

> "A review of the legislative history shows that Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election. Title IV as enacted serves these purposes by referring all complaints to the Secretary so that he can screen out frivolous ones, and by consolidating all meritorious complaints in a single proceeding, the Secretary's suit in federal district court."

Nor are these manifest expressions of Congressional intent somehow without "application" (Petition, p. 13), where the private action is against employers. A mere reading of the complaint suffices to show that there can never be any private action under §401(g), regardless of the identity of the defendant or the nature of the relief requested, which does not, of necessity, intrude upon internal union affairs. As the court

below found, "... there is no substantial evidence that Congress distinguished employers and unions ... If a private right of action against employers were provided under this statute, the centralization of litigation and the limitation on judicial interference in union affairs which now exist would be disrupted" (A. 4a). This case is precisely the type of action which Congress intended to prevent by vesting exclusive enforcement authority in the Secretary of Labor.

Title IV did not create a right to an election free of employer contributions (Petition, p. 12). Nor was it concerned with the mere contribution or application of monies by a union, union member or employer (Petition, p. 13) but with the effect, if any, of such contributions, regardless of their source, on the outcome of an election. The statute expressly provided for enforcement of the sole right which it created—the right to have elected union officials be representative of union rank and file. Contributions, regardless of their source, were not made actionable unless the Secretary of Labor found probable cause to believe that they tainted the election results. In a case such as this, where there admittedly was no taint (Petition, p. 4), no federal right has been violated and, accordingly, there is no need to imply any remedy therefor.

This is not a case like *Wyandotte Transportation Co. v. United States,* 389 U.S. 191 (1967) (Petition, pp. 12-14), where this Court was concerned not with the implication of a private right of action under a federal statute but with the scope of the sovereign powers of the United States government. *Supra,* 389 U.S. at 201. Nor is this a case like *Cannon v. University of Chicago, supra* (Petition, p.12), where this Court found that the relevant legislative history "rather plainly indicates that Congress intended to create such a remedy." *Supra,* 441 U.S. at 694. In the instant action, legislative history clearly establishes that a private right of action was considered and expressly rejected.

The Court of Appeals correctly applied controlling decisions of this Court in holding that "Congress did not intend to

give individual union members unfettered discretion to pursue individual suits against individual violators" (A. p. 4a). Further, as the Court below noted, it follows from the express exclusivity of the statutory remedy provided by Congress (24 U.S.C. § 483) that the so-called state law torts of which plaintiffs complain "are inextricably bound-up in the statutory provisions of Title IV" and, accordingly, are enforceable solely by the Secretary in accordance with federal law. See, *Calhoon v. Harvey, supra* at 138-141 (1964); *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959); *Linn v. United Plant Guard Workers of America, Local 114,* 383 U.S. 53, 57-59 (1966). See also, *Arnold v. District Council No. 9, International Bro. of Painters,* 61 A.D.2d 748 (2d Dept.), *appeal dismissed,* 45 N.Y.2d 732 (1978), *rev'd on other grounds,* 46 N.Y.2d 999 (1979).

Congressional intent is dispositive and plaintiffs' arguments as to the supposed benefits of private enforcement (Petition, p. 9-10) are misplaced. As this Court recently observed in *Touche Ross & Co. v. Redington, supra,* CCH Fed. Sec.L.Rep. at 95,663:

> "The inquiry in a case such as this ends when it is determined on the basis of the statutory language and the legislative history that Congress did not intend to create, either expressly or by implication, a private cause of action. Further inquiries as to the 'necessity' of implying a private remedy and the proper forum for enforcement of the asserted rights have little relevance to the decision of the case . . . And generalized references to the 'remedial purposes' of the Act do not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit' (citations omitted)."

See also, *Transamerica Mortgage Advisers Inc. v. Lewis, supra,* 48 L.W. at 4004 ("the dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end.").

II

THERE IS NO CONFLICT AMONG THE CIRCUITS

The suggestion that the decision below is in conflict with decisions of other circuits (Petition, p. 10, footnote 9) is not and cannot be substantiated. Indeed, the only other Circuit Court to have addressed the question of whether a private right of action against employers may be implied under a Title of the LMRDA which expressly provides for exclusive enforcement by the Secretary of Labor, recently held that the implication of such a private right of action would conflict with "evidence of legislative intent to provide for enforcement only by the Secretary." See, *Auto Workers v. Right to Work Foundation,* 590 F.2d 1139, 1155 (D.C. Cir. 1978).*

Nor is there any conflict among the Circuits on the question of the exclusivity of the remedy set forth in § 402 of the LMRDA (Petition, p. 16). This is not a case like *Amalgamated Clothing Workers v. Amalgamated Clothing Workers, supra.* That suit was brought under the pre-election remedies set forth in Title I, not Title IV, of the LMRDA and Title I, unlike Title IV, expressly provides for such private enforcement actions. Moreover, the Third Circuit noted in its opinion that "it has been clear that Title IV rights are not enforceable through post-election private suit." *Supra,* 473 F.2d at 1305.

No conflict arises from the decision in *Ross v. International Bro. of Electrical Workers,* 513 F.2d 840 (9th Cir. 1975). There, the plaintiff sued for abuse of process and malicious prosecution, both tort claims having nothing whatever to do with the provisions of Title IV of the LMRDA. As the Ninth Circuit stated, the crux is not the nature of the relief sought (Petition, p. 16), but the substantive origin of the claims.

* The issue there was whether a private right of action against employers should be implied under Title II of the LMRDA, which specifically authorizes only the Secretary of Labor to commence enforcement proceedings. 29 U.S.C. § 440.

Where those claims are inextricably intertwined with the provisions of § 401, as the claims in Counts II and III clearly are, the Ninth Circuit ruled that the remedy legislated by Congress in § 402 is exclusive and all private enforcement actions are precluded. *Ross v. International Bro. of Electrical Workers, supra,* 513 F.2d at 843.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

TITLE IV — ELECTIONS

Terms of Office; Election Procedures (29 U.S.C. 481)

Sec. 401. (a) Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

(b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

(c) Every national or international organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective

bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

(d) Officers of intermediate bodies, such as general committees, system boards, joint boards or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any members thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

(f) When officers are chosen by a convention of delegates elected by secret ballot, the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this title. The officials designated in the constitution and bylaws or the secretary, if no other is designated, shall preserve for one year the credentials of the delegates and all minutes and other records of the convention pertaining to the election of officers.

(g) No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title. Such moneys of a labor organization may be utilized for notices, factual statemments of issues not involving candidates, and other expenses necessary for the holding of an election.

(h) If the Secretary, upon application of any member of a local labor organization, finds after hearing in accordance with the Administrative Procedure Act that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this title.

(i) The Secretary shall promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of the removal procedures to which reference is made in subsection (h).